

ANNE GOODWIN CRUMP*
VINCENT J. CURTIS, JR.
PAUL J. FELDMAN*
RICHARD HILDRETH
EDWARD W. HUMMERS, JR.
FRANK R. JAZZO
KATHRYN A. KLEIMAN
BARRY LAMBERGMAN
PATRICIA A. MAHONEY
M. VERONICA PASTOR*
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
MARVIN ROSENBERG
LONNA M. THOMPSON
KATHLEEN VICTORY*
HOWARD M. WEISS
*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ROSSLYN, VIRGINIA 22209

P. O. BOX 33847

WASHINGTON, D.C. 20033-0847

(703) 812-0400

TELECOPIER

(703) 812-0486

February 22, 1994

PAUL D.P. SPEARMAN
(1936-1982)
FRANK ROBERSON
(1936-1961)

RETIRED
RUSSELL ROWELL
EDWARD F. KENEHAN
ROBERT L. HEALD
FRANK U. FLETCHER

OF COUNSEL
EDWARD A. CAINE*

SPECIAL COUNSEL
CHARLES H. KENNEDY*

WRITER'S NUMBER
(703) 812-

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY


Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Re: MM Docket No. 93-100 (RM-8175)
Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations (Cleveland
and Ebenezer, Mississippi)

Dear Mr. Caton:

Enclosed, on behalf of Radio Cleveland, Inc. ("RCI"), licensee of Station WCLD-FM, Cleveland, Mississippi, please find an original and 4 copies of RCI's "Opposition to Petition for Reconsideration" in Mass Media Docket No. 93-100 (RM-8175), regarding amendment of the Commission's Table of Allotments for FM broadcast stations in regards to Cleveland and Ebenezer, Mississippi. Please contact the undersigned counsel if there are any questions regarding this matter.

Sincerely,


Paul J. Feldman
Counsel for
Radio Cleveland, Inc.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEB 22 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations.
(Cleveland and Ebenezer,
Mississippi)

MM DOCKET NO. 93-100
RM-8175

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Radio Cleveland, Inc. ("RCI"), licensee of station WCLD-FM, Channel 280A, Cleveland, Mississippi, by its attorneys, hereby opposes the Petition for Reconsideration filed on January 10, 1994, by Afro-American Broadcasters of Mississippi (hereafter "AABM") in MM Docket No. 93-100 (hereinafter the "Petition")¹. In support thereof, the following is shown:

I. Introduction

On April 20, 1993, the Chief of the Allocations Branch released a Notice of Proposed Rulemaking, MM Docket No. 93-100, DA 93-366 ("NPRM") proposing to substitute Channel 280C3 for Channel 280A, to modify the license of station WCLD-FM to specify operation thereon. In addition, the NPRM proposed to delete the vacant Channel 280A allotment at Ebenezer, Mississippi, in order to

¹ Public Notice of the filing of AABM's *Petition for Reconsideration* appeared in the Federal Register on February 4, 1994 (59 Fed. Reg. 5430). Accordingly, pursuant to Sections 1.4 and 1.429(f) of the FCC's Rules, this Opposition is timely filed.

accommodate the WCLD-FM upgrade.² The NPRM also stated that if comments were filed during the comment cycle expressing an intention to file an application for, and construct and operate a station on, Channel 280A at Ebenezer, then the Commission would open a filing window for that channel. Nevertheless, the NPRM stated that there was substantial evidence that the substitution of channels, and the deletion of the Ebenezer allotment was in the public interest, in light of the increased population that could be served as a result of the WCLD-FM upgrade, and in light of JimBar's determination that Ebenezer was incapable of supporting an FM station.

The pleading cycle was commenced, and comments were filed by RCI and AABM. Having already made a detailed showing in its Petition for Rulemaking, RCI restated its support for the proposed substitution and deletion of channels. Counsel for AABM filed a two page pleading, which stated in one short paragraph, an expression of interest in the Ebenezer allotment and a request that the allotment not be deleted. Absolutely nothing was stated revealing the identity of AABM's principals, or addressing the underlying issue in this proceeding: Ebenezer's status as a "community" for the purposes of Section 307(b) of the Communications Act (47 U.S.C. § 307(b)). Indeed, the AABM pleading

² The NPRM was issued in response to the Petition for Rulemaking jointly filed by RCI and James L. Haffey d/b/a JimBar Enterprises ("JimBar"), holder of the now cancelled construction permit for Channel 280A in Ebenezer.

was in essence the bare minimum required to oppose the proposal in the NPRM, and delay the upgrade of WCLD-FM.

In its Reply Comments, RCI demonstrated that Ebenezer no longer qualified as a "community" for the purposes of Section 307(b). Its population had dropped from 150 in 1987 to 100 in 1992, a 33% reduction. Ebenezer is neither incorporated, nor is it a Census Designated Place according to the U.S. Census Bureau. Ebenezer has no school system or local newspaper.³ AABM failed to file Reply Comments.

In the Report and Order in this proceeding, DA 93-1373, released December 13, 1993, the Assistant Chief of the Allocations Branch recognized the public interest in the RCI proposal, and ordered the substitution of Channel 280C3 for Channel 280A at Cleveland, and the deletion of the Channel 280A allotment at Ebenezer, Mississippi. The Staff properly found that Ebenezer is essentially a "ghost town" and no longer qualifies as a "community" for Section 307(b) allotment purposes. While recognizing the "expression of interest" filed by AABM, the Staff noted that AABM failed to address the discussion in the NPRM regarding JimBar's reasons for deletion of the Ebenezer allotment, although given the opportunity to do so in its Comments (and in Reply Comments), and thus AABM failed to provide a showing sufficient to support the retention of the channel. Report and Order at para. 6.

Now, having failed to provide more than a paragraph of

³ RCI also demonstrated that even if Ebenezer were entitled to "community" status, it would not be entitled to a Section 307(b) preference over the WCLD-FM upgrade.

substantial information in its Comments, and having failed to even file Reply Comments, AABM has now filed its Petition seeking reconsideration of the Commission action, arguing that it has not had a fair opportunity to express its support for the retention of the Ebenezer allotment. However, AABM has not, and cannot, make a compelling case for reconsideration of the action properly taken in the Report and Order. Any reader of the NPRM, including AABM, had fair notice that the deletion of the Ebenezer allotment was being considered in this proceeding, and that if retention of the Ebenezer allotment was sought, information in support of the continued allotment of the Ebenezer channel should have been submitted.⁴ AABM failed to provide any such support. Furthermore, AABM fails to provide any other substantive basis for reconsideration of the Report and Order. Accordingly, AABM's Petition should be denied.

II. The NPRM Fairly Apprised AABM of the Possibility That the Ebenezer Allotment Could Be Deleted.

In its Petition, AABM asserts that the deletion of the Ebenezer allotment was improper because the action was taken without giving notice that such deletion could occur even if a party expressed interest in the allotment. AABM states that:

The Commission's NPRM failed to indicate that the attributes of Ebenezer were at all in issue; it certainly did not request any showing thereof along with the expression of interest.

⁴ Furthermore, AABM's actions (or perhaps, inaction) cast doubt on the sincerity of its pledge to construct and operate a station at Ebenezer.

Petition at page 2.

This assertion is incorrect -- the NPRM makes it clear that the attributes of Ebenezer were at issue in this proceeding. The NPRM specifically proposed to delete the Ebenezer allotment. Paragraphs 2 and 3 of the NPRM directly addressed the issue of Ebenezer's ability to support a station in light of its small size. Note 3 of the NPRM referred to attributes of a community that are commonly at issue in a Section 307(b) analysis (population, and the presence of a post office and separate zip code). There was a reason for the NPRM's discussing such matters: the existence of the Ebenezer allotment was specifically at issue.⁵

Thus, it is clear that the deletion of the Ebenezer allotment was specifically at issue in this proceeding, and that AABM had fair notice of that issue from the NPRM. AABM next asserts, however, that it did not have fair notice of the possibility that the Ebenezer allotment might be deleted in the face of an expression of interest. Petition at page 3. This argument fails to provide a basis for reconsideration of the deletion of the Ebenezer allotment. It is black letter law that an agency's action in a notice and comment proceeding need not precisely follow that proposed in an NPRM. If so, the agency could never modify its

⁵ The NPRM also specifically required commenters to follow the procedures set forth in the NPRM's Appendix. Paragraph 2 of the Appendix states that "proponent(s) will be expected to answer whatever questions are presented in initial comments." AABM was a "proponent" in this proceeding, proposing that the Commission retain the Ebenezer allotment. RCI's Comments specifically supported the deletion of the Ebenezer allotment, and AABM was thus obliged to address such matters in Reply Comments. It failed to file Reply Comments.

proposal in response to information in the comments without issuing another NPRM, and so on, *ad infinitum*. See, *Small Refiner Lead Phase-Down Task Force v. E.P.A.*, 705 F.2d 506,546-47 (D.C. Cir. 1983).⁶ AABM has correctly stated the test for whether the public has had a fair opportunity to comment on agency action: "whether the agency's notice would 'fairly apprise interested parties of the subject and issues' [of the rulemaking]." *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2nd Cir. 1986). Petition at page 3. In this proceeding, however, the NPRM clearly provided notice of the subject and issues of the proceeding: the subject was the Ebenezer allotment, and the issue was whether the public interest would be served by the deletion of that allotment. See paragraphs 2 and 3 and note 3 of the NPRM. AABM was thus fairly apprised that the Commission could delete the Ebenezer allotment in this proceeding. The Commission should not allow AABM to take a second "bite at the apple" when it had a fair opportunity to act in a timely manner during the pleading cycle. To do so would not only be unfair to RCI, it would establish a precedent to be used in other proceedings which would undermine the administrative finality necessary for the Commission to effectively carry out its duties.

**II. AABM Has Provided No Substantive Basis For
Reconsideration of the Report And Order.**

As was noted above, in spite of the stated proposal to delete

⁶ See also, *American Iron & Steel Inst. v. E.P.A.*, 568 F.2d 284,293 (1977), wherein the Third Circuit stated that "the submission of a proposed rule for comment does not of necessity bind an agency to undertake a new round of notice and comment before it adopts a rule which is different -- even substantially different -- from the proposed rule."

the Ebenezer channel, AABM chose to devote no more than a paragraph to these matters in the original pleading cycle, failing to even discuss whether Ebenezer was still viable as a Section 307(b) "community." The Petition similarly provides little substantive argument to support its call for reconsideration of the Commission's action in this proceeding.

AABM cannot and does not dispute the principle underlying the Commission's action: Section 307(b) requires that there be a community as a precondition for the allotment of a broadcast frequency, and thus where a substantial community no longer exists, an allotment can and should be deleted. See Report and Order at para. 6, citing *Flora and Kings, Mississippi*, 7 FCC Rcd 5477 (1992), at note 2, and *Garden City, Indiana*, 6 FCC Rcd 3747 (1991). Indeed, while the NPRM stated that it was "Commission policy" not to delete a channel in which interest had been expressed, in this particular proceeding, application of this policy must certainly give way to the statutory requirements of Section 307(b), which require the deletion of the Ebenezer allotment. The Report and Order properly recognizes this priority in paragraph 6.

AABM makes four arguments, on matters other than notice requirements, in support of its request for reconsideration. None of these arguments are persuasive.

First, AABM notes that Ebenezer was previously found to be a community for Section 307 purposes, and asserts that the Commission has not identified any facts regarding subsequent developments justifying the deletion of the allotment. Petition at page 4. This is flatly incorrect: paragraph 6 of the Report and Order notes the

substantial decline in Ebenezer's population, and its deteriorating economic conditions, as cited by the permittee of the Ebenezer channel.

Second, AABM notes that Ebenezer has two churches, a volunteer fire department, a water system and a retail store with Ebenezer in its name. These factors hardly provide, on their own, the basis for a finding that Ebenezer continues to be a viable community, and certainly do not outweigh the substantial decline in Ebenezer's population.

Third, AABM notes that the Commission has previously allotted FM channels to a community with even less indicia than Ebenezer, in *Yermo and Mountain Pass, California*, 45 R.R. 2d 58 (B.B. 1979). Petition at pages 4-5. Yet, the most important factor, population, renders this case an inappropriate precedent for Ebenezer. Mountain Pass had a population of 250-260, at least two and a half times the population of Ebenezer.

Lastly, AABM argues that an Ebenezer station would serve travelers on nearby Interstate 55. However, this assertion was already made by AABM in its Comments, and the Commission rejected it in the Report and Order based on the principle that because a licensee's primary obligation is to serve the needs of its community of license, evidence of other communities and populations is not determinative. See Report and Order at note 4. AABM does not and cannot dispute this principle.

In sum, the Petition fails to provide any substantive basis for reconsideration of the action taken in the Report and Order. The Petition should be denied.

III. Conclusion

In spite of the stated proposal in the NPRM to delete the Ebenezer allotment, AABM chose to devote no more than a paragraph to these matters in the original pleading cycle. AABM had fair notice of the issues in this proceeding and chose to state the bare minimum required to delay the deletion of the Ebenezer allotment and the upgrade of WCLD-FM. Furthermore, AABM's Petition provides no substantive basis for reconsideration of the Commission's actions in this proceeding. The Commission should not tolerate further "minimalist" attempts at delay offered by AABM's undisclosed principals. AABM's Petition should be denied.

Respectfully submitted,

RADIO CLEVELAND, INC.

By: 
Frank R. Jazzo
Paul J. Feldman

Its Attorneys

FLETCHER, HEALD & HILDRETH
11th Floor
1300 North 17th Street
Rosslyn, Virginia 22209
(703) 812-0400

February 22, 1994

CERTIFICATE OF SERVICE


I, Inder Kashyap, an employee of Fletcher, Heald & Hildreth, hereby certify that a copy of the attached OPPOSITION TO PETITION FOR RECONSIDERATION" was filed with the Federal Communications Commission on February 22, 1994, and served on that same day by first class U.S. mail, postage prepaid, to the following:

Victoria McCauley, Esquire*
Assistant Chief
Allocations Branch
Federal Communications Commission
Room 8322, Stop Code 1800D5
2025 M Street, N.W.
Washington, D.C. 20554

Ms. Kathleen Scheuerle*
Allocations Branch
Federal Communications Commission
Room 8314, Stop Code 1800D5
2025 M Street, N.W.
Washington, D.C. 20554

Mr. Jerrold Miller
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for Afro-American Broadcasters
of Mississippi)

*BY HAND DELIVERY



Inder M. Kashyap